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exclusive use of the surface, hence that the use is adverse, especially if the railroad only fences in a portion of the right of way taken and the abutting owner fences the outer portion in with his own land.⁸ In view of the wide area traversed by the railroads, and the character of the right of way the former view seems more equitable. The same rule should be applied as to public highways, that the public interest predominates and that the railroad should not lose its right of way through the negligence of its local agents, any more than the public itself is barred by the carelessness of its officers.

J. S. M., Jr.

PUBLIC LANDS: OREGON LAND GRANT CASE: CONDITION OR COVENANT.—A case of more than ordinary interest to the West because of the magnitude of the interests involved and the number of individuals directly or indirectly affected by the decision is that of the *Oregon & California Railroad Company v. United States*.¹ In addition to numerous settlers on the lands in question who were made defendants, there were about six thousand other persons who intervened because of their interest in the outcome.

The case was certified to the Supreme Court of the United States by the Circuit Court of Appeals for the Ninth Circuit, bringing up for review a decision of the federal District Court for the District of Oregon, which decreed a forfeiture to the United States of over two million acres, being the unsold portion of the land grant to the appellant railroad. This grant had been made by Act of Congress in 1866 and amended on subsequent dates² and contained provisos that the lands granted by the act "shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre." While for a time the railroad grantee complied with the terms of the grant, its successor in interest in many instances sold the lands embraced in the grant for more than two and one-half dollars per acre and in parcels exceeding one hundred and sixty acres and to others than actual settlers, and finally in 1903 withdrew from sale altogether over two million acres then remaining unsold, asserting that they were timber lands and unsuitable for settlement. The government contended that the provisos in the grant constituted conditions subsequent and that the failure to comply with these conditions resulted in a forfeiture of the lands to the United States. The railroad company insisted that these provisos were merely restrictive and unenforceable covenants. The determination of this question turned upon whether these re-

⁸ *Southern Ry. Co. v. Gossett* (1908), 79 S. Car. 372, 60 S. E. 956; *Ill. Cent. R. Co. v. Houghton*, *supra*, note 3; *Matthews v. L. S. & M. S. Ry. Co.*, *supra*, note 3.

¹ (June 21, 1915), 35 Sup. Ct. Rep. 908.

² 14 Stat. at L. 239; 16 Stat. at L. 47; 16 Stat. at L. 94.

strictions upon the disposition of the lands granted became "more dominant in purpose than the building of the road," to aid which the lands had been granted. The court recognized the difficulty of determining the relative weight to be given these conjoint purposes. The early grants to the railroads had been without restriction as to disposition and were given "as aids to enterprises of great magnitude and uncertain success and which might not have succeeded under a restrictive and qualified aid." The policy met with success and "empire was given a path westward and prosperous commonwealths took the place of a wilderness." However, this was not entirely achieved at the time the grant in question was made, and the construction of the road was still the primary national purpose and the occupation of the lands by actual settlers was secondary. A forfeiture of the grant might have been destructive of the entire enterprise and defeated the primary purpose of the grant as well as the secondary. The fact that an explicit provision in one of the granting acts provided for a forfeiture of the lands not then patented, in the event of a failure to complete the road within the prescribed time, was held to indicate that a more drastic forfeiture, viz.: of patented and unpatented lands, could not rationally be contemplated for a failure to comply with provisions of lesser importance. The court announced the familiar rule that "conditions subsequent are not favored but are always strictly construed," and wherever doubt exists as to "whether a clause be a covenant or a condition the courts will incline against the latter construction," and a court of equity especially "is reluctant to lend its aid to enforce a forfeiture." It, therefore, held that the provisos in question are covenants and enforceable. The decree of the trial court declaring the lands forfeited was reversed and an injunction ordered to prevent a repetition of violations of the covenants. This remedy, however, was held not to afford full measure of relief since the lands were shown to be mainly valuable for timber and largely unfitted for settlement. In view of this situation, so inconsistent with the provisos of the grant, the court further restrained the railroad from cutting or disposing of the timber "until Congress shall have a reasonable opportunity to provide by legislation for their disposition in accordance with such policy as it may deem fitting under the circumstances, and at the same time secure to the defendants all the value of the granting acts conferred upon the railroads." In the absence of such provision being made by Congress within a reasonable time, the defendants were allowed to apply to the trial court for a modification of the injunction. It is a rather remarkable proceeding that a court should shift the determination of these problems to Congress and restrain the parties from acting in the interim. It is characteristic of a broader and more liberal treatment of problems by that court as evidenced by recent decisions. Just what form this legislation shall take is the subject of extensive conferences throughout Oregon, by those interested in the outcome.

The State of Oregon, through its attorney general, appeared as

amicus curiae, and urged that the lands in question become subject to settlement and improvement as contemplated by the provisions of the grant, in order that they might not be withdrawn from taxation, thus depriving the state of revenue from this source. This is the voicing of a protest quite prevalent in the West and founded on considerable reason, that the withdrawal and permanent reservation of vast areas of public domain by the federal government, places the states embracing such areas on a distinct plane of inequality with states which exercise complete sovereignty and power of taxation over all the lands within their borders.³ Many of the parties to the action were settlers on lands already sold. The rights of such parties were left to be determined in other suits which the government might elect to initiate.

V. M. A.

VENDOR AND PURCHASER: DESTRUCTION OF BUILDING: RISK OF LOSS.—In a contract for the sale of improved realty, upon whom should the loss fall when the improvements are destroyed before the day set for the completion of the contract? In the case of *Higbie and Higbie v. Shields*,¹ a mill was burned between the date of the contract of sale and the day of conveyance. The court held that the loss fell on the vendor, and in so deciding laid particular stress on the fact that the vendor was in possession.

The courts of this country are divided, although not evenly, in determining this question, some holding that the loss falls on the vendee;² others, though usually courts of law, that the loss falls on the vendor;³ and still a third group that the loss falls on the party in possession.⁴

"Since the decision of *Paine v. Meller*⁵ it has not been doubted in England that the buyer is not excused from fulfilling his promise

³ See *Deseret Water etc. Co. v. State of California* (1914), 147 Cal. 147, 138 Pac. 981; *The New Public Land Policy*, 3 California Law Review, 289-291.

¹ (June 3, 1915), 20 Cal. App. Dec. 902, 150 Pac. 801. (Rehearing denied by Supreme Court, Aug. 2, 1915.)

² *Martin v. Carver's Adm'r* (1886), 8 Ky. 56, 1 S. W. 199; *Sewell v. Underhill* (1908), 127 App. Div. 92, 111 N. Y. Supp. 85; *Dunn v. Yakish* (1900), 10 Okla. 388, 61 Pac. 926; *Manning v. North British & Mercantile Ins. Co.* (1907), 123 Mo. App. 456, 99 S. W. 1095; *Woodward v. McCollum* (1907), 16 N. Dak. 42, 111 N. W. 623.

³ *Gould v. Murch* (1879), 70 Me. 288, 35 Am. Rep. 325; *Wells v. Calman* (1871), 107 Mass. 514, 9 Am. Rep. 65; *Powell v. Dayton etc. Ry. Co.* (1885), 12 Ore. 488, 8 Pac. 544.

⁴ *Conlin v. Osborne* (1911), 161 Cal. 659, 120 Pac. 755; *Smith v. Phoenix Ins. Co.* (1891), 91 Cal. 323, 25 Am. St. Rep. 191, 27 Pac. 738; *Sharman v. Continental Ins. Co.* (1914), 167 Cal. 117, 138 Pac. 708, 1 California Law Review, 387.

⁵ (1801), 6 Ves. Jr. 349, 31 Eng. Rep. R. 1088.